Supreme Court, U.S.
FILED
07-536 OCT 18 2007
OFFICE OF THE CLERK

No. 07-_____

IN THE

Supreme Court of the United States

DR. FRANCISCO SÁNCHEZ-ARÁN,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas C. Goldstein*
Patricia A. Millett
Duncan N. Stevens
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave.
Washington, DC 20036
(202) 887-4000

Mark J. Rochon
MILLER & CHEVALIER CHARTERED
655 15th St. NW
Suite 900
Washington, DC 20005
(202) 626-5800

*Counsel of Record

Attorneys for Petitioner

October 18, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the court of appeals erred in holding, in conflict with the decisions of the Second, Third, Seventh and D.C. Circuits, that a failure to instruct a jury on the enactment date of a criminal statute was not error, when the evidence permitted the jury to rest its verdict solely on pre-enactment conduct.

LIST OF PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the United States Court of Appeals for the First Circuit are:

Lorenzo Munoz-Franco

Dr. Francisco Sanchez-Aran

Ariel Gutierrez-Rodriguez

Wilfredo Umpierre-Hernandez

The United States

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDING..... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 7

A. THE CIRCUITS HAVE SPLIT ON AN IMPORTANT CONSTITUTIONAL ISSUE..... 8

1. Many Circuits Vacate Continuing-Offense Convictions If It Is Reasonably Possible That An Ex Post Facto Clause Violation Occurred..... 9

2. Four Circuits Have Drawn Inferences In The Government's Favor. 15

B. UNDER THE SECOND, THIRD, SEVENTH AND D.C. CIRCUITS' STANDARD, PETITIONER'S CONVICTIONS MUST BE VACATED. 18

1. The First Circuit Did Not Follow The Second, Third, Seventh and D.C. Circuit's Analysis..... 19

2. There Is A Reasonable Possibility That The Jury Relied Exclusively On Pre-Enactment Evidence in Convicting Petitioner. 24
C. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS. 26
1. This Court Has Articulated a Demanding Standard of Review for Constitutional Errors. 27
2. The First Circuit's Ex Post Facto Clause Analysis Is Inconsistent With This Court's Approach to Error Review. 30
D. THIS CONSTITUTIONAL QUESTION IS IMPORTANT AND RECURRING, AND IS APPROPRIATELY RESOLVED IN THIS CASE. 32

CONCLUSION 34

Appendix A:

Opinion of the Court of Appeals for the First Circuit 1a

Appendix B:

Opinion and Order of the U.S. District Court for the District of Puerto Rico 92a

Appendix C:

Order of the Court of Appeals for the First Circuit Denying Rehearing and Rehearing En Banc 117a

TABLE OF AUTHORITIES

Federal Cases

Blakely v. Washington, 542 U.S. 296 (2004) 29
Boyde v. California, 494 U.S. 370 (1990) 27
Calder v. Bull, 3 U.S. 386 (1798) 33
Carmell v. Texas, 529 U.S. 513 (2000) 33
Chapman v. California, 386 U.S. 18(1966) ..... *passim*
Clemons v. Mississippi, 494 U.S. 738 (1990) 27
Collins v. Youngblood, 497 U.S. 37 (1990) 8
County Court v. Allen, 442 U.S. 140 (1979) . 27, 29, 31
Cramer v. United States, 325 U.S. 1 (1945) 29
Cunningham v. California, 127 S. Ct. 856 (2007) ... 29
Dennis v. United States, 384 U.S. 855 (1966) 16
Dobbert v. Florida, 432 U.S. 282 (1977) 33
Fahy v. Connecticut, 375 U.S. 85 (1963) 28
Francis v. Franklin, 471 U.S. 307 (1985) 27
Marks v. United States, 430 U.S. 188 (1977) 29
Miller v. Florida, 482 U.S. 423 (1987) 8
Mills v. Maryland, 486 U.S. 367 (1988) 27
Olden v. Kentucky, 488 U.S. 227 (1988) 31
Rose v. Clark, 478 U.S. 570 (1986) 27
Sandstrom v. Montana, 442 U.S. 510 (1979) 28, 30
Shepard v. United States, 544 U.S. 13 (2005) 29
Street v. New York, 394 U.S. 576 (1969) 28
Stromberg v. California, 283 U.S. 359 (1931) 29
Sullivan v. Louisiana, 508 U.S. 275 (1993) ..... *passim*
United States v. Bagley, 473 U.S. 667 (1985) 29
United States v. Booker, 543 U.S. 220 (2005) 29
United States v. Brown, 555 F.2d 407 (5th Cir. 1977). ..... *passim*
United States v. Calabrese, 825 F.2d 1342 (9th Cir. 1987) ..... *passim*
United States v. Cortez, 757 F.2d 1204 (11th Cir. 1985) ..... *passim*

United States v. Duncan, 42 F.3d 97 (2d Cir. 1994) .. 8
United States v. Harris, 79 F.3d 223 (2d Cir. 1996) 10
United States v. Henson, 848 F.2d 1374 (6th Cir. 1988) 16
United States v. Julian, 427 F.3d 471 (7th Cir. 2005), *cert. denied*, 546 U.S. 1220 (2006) ..... *passim*
United States v. Mitchell, 49 F.3d 769 (D.C. Cir. 1995) 13, 18
United States v. Monaco, 194 F.3d 381 (2d Cir. 1999) 10
United States v. Munoz-Franco, 487 F.3d 25 (1st Cir. 2007) 1
United States v. Olano, 507 U.S. 725 (1993).... *passim*
United States v. Scates, No. 86-5621, 818 F.2d 30 (table), 1987 WL 37328 (4th Cir. May 6, 1987)..... 17
United States v. Todd, 735 F.2d 146 (5th Cir. 1984) ... . *passim*
United States v. Torres, 901 F.2d 205 (2d Cir. 1990) ..... *passim*
United States v. Tykarsky, 446 F.3d 458 (3d Cir. 2006) ..... *passim*
United States v. Williams-Davis, 90 F.3d 490 (D.C. Cir. 1996) 13, 18, 20
United States v. Yates, 354 U.S. 298 (1957)..... 28, 29
Williams v. North Carolina, 317 U.S. 287 (1942).... 28

State Cases

Knowles v. State, 708 So. 2d 549 (Miss. 1998) ... 13, 14
People v. Graham, 876 P.2d 68 (Colo. App. 1994) ... 14
People v. Kyle, 111 P.3d 491 (Colo. App. 1994) 14
People v. Luman, 994 P.2d 432 (Colo. App. 1999) ... 14
State v. Aho, 975 P.2d 512 (Wash. 1999)..... 14
State v. Hudspeth, 821 P.2d 547 (Wash. App. 1992) 14

State v. Ricci, 5[illegible]A.2d 362 (N.J. Super. Ct. App. Div. 1991) 14

Constitutional Provisions

U.S. Const., art. 1, § 9, cl. 3 1

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 1
18 U.S.C. §§ 1341, 1343 2
18 U.S.C. § 1344 ..... *passim*
18 U.S.C. § 3231 1
18 U.S.C. § 371 5
18 U.S.C. § 657 ..... 5, 7
18 U.S.C. § 848(b) 9

Rules

Fed. R. Crim. P. 52 18

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *United States v. Munoz-Franco*, 487 F.3d 25 (Pet. App. A). The opinion of the United States District Court for the District of Puerto Rico, denying Petitioner's motion for new trial, is unreported (Pet. App. B).

JURISDICTION

The district court had jurisdiction over this criminal case under 18 U.S.C. § 3231. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The First Circuit decided this case on May 22, 2007. A timely rehearing petition was denied by the First Circuit on July 20, 2007 (Pet. App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Ex Post Facto Clause of the Constitution, U.S. Const. art. 1, § 9, cl. 3, states as follows:

No Bill of Attainder or ex post facto Law shall be passed.

2. The federal bank fraud statute, 18 U.S.C. § 1344(a), states as follows:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud a federally chartered or insured financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial

institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $ 10,000, or imprisoned not more than five years, or both.

STATEMENT OF THE CASE[1]

The First Circuit ruled that a district court's failure to instruct a jury on the enactment date of a criminal statute, when the conduct in question began well before that enactment date, does not violate the Ex Post Facto Clause as long as the majority of the evidence presented at trial related to conduct that occurred after the statute was enacted. That holding deepens a split among the circuits on the proper standard for addressing Ex Post Facto Clause instructional errors, and improperly resolves against criminal defendants the ambiguities created by constitutional errors at trial. The rule adopted by the Second, Third, Seventh, and D.C. Circuits, and the rule that is consistent with this Court's precedents, is to vacate a conviction if there is a reasonable possibility that the jury relied on conduct predating the criminalizing statute. This Court should grant review to resolve the conflict among the circuits on this important question of constitutional law.

1. The bank fraud statute, 18 U.S.C. § 1344, became law on October 12, 1984. Prior to that, there was no federal criminal prohibition on bank fraud itself. Federal law, however, did prohibit mail and wire fraud. 18 U.S.C. §§ 1341, 1343.

The indictment alleged two bank fraud schemes, one lasting from June 1980 to May 1990, and the

---

[1] Petitioner hereby adopts and joins the petitions of the other defendants in this matter.

other lasting from December 1981 to May 1990. The indictment did not allege mail fraud, wire fraud, or any other general fraud offense that was on the books prior to October 12, 1984. Section 1344 was the only fraud provision cited.

2. Throughout the 1980s, Lorenzo Munoz-Franco and Petitioner Dr. Francisco Sanchez-Aran were the president and executive vice president, respectively, of Caguas Central Federal Savings & Loan, a Puerto Rico thrift.[2] Ariel Gutierrez and Wilfredo Umpierre were officers of Transglobe Corporation and Modules Manufacturing, Inc., companies that received substantial construction loans from Caguas in the early 1980s and thereafter acted as contractors for other borrowers. Caguas also executed construction loans to companies owned by Francisco Mirandes throughout the 1980s.

One of Caguas's first loans during the indictment period to companies led or controlled by Gutierrez and Umpierre was executed on June 25, 1980 for the La Marina project.[3] Another project, Levittown Plaza, was the subject of a Caguas loan executed on January 30, 1981, and another loan for the Quintas de Country Club project was executed on March 31, 1982.[4] On these loans, the construction schedule was not met, and interest payments were taken from loan proceeds to maintain the repayment schedule.[5] In addition, monies were transferred to and from other projects, and the transferred amounts were

---

[2] JA-T-2387. References are to the record filed with the First Circuit.

[3] JA-T-0079-80.

[4] JA-T-0143-44, -0174.

[5] JA-T-0085-86, -0089, -0241-42.

used for loan repayments.[6] The loans were repaid on October 29, 1984, by the DOW Group (not owned or controlled by Gutierrez or Umpierre), which obtained new loans from Caguas and closed out the Gutierrez loans.[7] After that date, Gutierrez and Umpierre (and affiliated companies) had no construction loans with Caguas; they served as contractors on projects financed through other borrowers through 1985. Effective December 31, 1985, Gutierrez sold Modules to Sergio Camero but remained as an employee of Modules; he and Umpierre left Modules in December 1986.[8]

Beginning in the early 1980s, Caguas also executed loans to companies held by Francisco Mirandes. For example, loans to Deproco Corporation, a Mirandes-held company, were executed for the Reparto Valenciano project on December 23, 1981, and for the Villas de Gurabo I project on May 15, 1984.[9] Both of those projects fell behind schedule, and multiple transfers were made to and from those loans and other Mirandes-held projects.[10]

At various points in 1982 and 1983, Caguas executed two-party checks payable to Transglobe Corporation and to various third parties (contractors and government agencies) in connection with the La Marina and Quintas de Country Club projects. The checks in question were ultimately deposited in Transglobe's accounts, endorsed by the third-party payees. It was later alleged that those endorsements

---

[6] *See, e.g.*, JA-T-0093-94, -0162-63, -0178-79.
[7] JA-T-0096-99, -0159-60, -0243-44.
[8] JA-T-1692-93, -2125-27, -3386-87.
[9] JA-T-0508-10, -0529.
[10] JA-T-0517-18, -0533-35.

had been forged on a few checks.[11] Also in 1983, a Caguas employee determined that a Gutierrez company had written checks from a Caguas account for deposit in another bank, and had also written checks from the other bank for deposit at Caguas—a practice he characterized as "check kiting."[12]

Following the passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Caguas fell out of capital compliance and was seized in May 1990.[13]

3. On November 22, 1995, Petitioner Sanchez-Aran was indicted in the U.S. District Court for the District of Puerto Rico (along with Munoz-Franco, Gutierrez, and Umpierre) on charges of bank fraud under 18 U.S.C. § 1344, conspiracy under 18 U.S.C. § 371 to commit, *inter alia*, bank fraud, and misapplication of bank funds under 18 U.S.C. § 657. Three superseding indictments were returned in 1997 and 1998. The final indictment charged two separate conspiracies and schemes (one involving Gutierrez and Umpierre and one involving Francisco Mirandes, who pleaded guilty before trial) and alleged acts extending from June 25, 1980 through May 25, 1990. 22 of the 104 overt acts alleged in the final indictment occurred prior to October 12, 1984.

At trial, the prosecution offered ample testimony on the pre-October 1984 conduct described above. The first several weeks of trial, for instance, were devoted entirely to the La Marina, Levittown Plaza, and Quintas de Country Club projects; there was no testimony about any other projects until more than

---

[11] *See, e.g.*, JA-T-1549-52, -1584-86.

[12] JA-T-1774-75.

[13] JA-T-2784-87.

two weeks after trial began. Several other witnesses discussed those projects at length later in the trial. Much of the one-day testimony of Mirandes concerned activity on Reparto Valenciano between 1981 and 1984. A Caguas employee testified for several days about the alleged check-kiting in 1983. Ten witnesses, in over two weeks of testimony, testified that their signatures endorsing Caguas checks over to Gutierrez-related corporations had been forged, and virtually all of those alleged forgeries predated 1984.

The jury returned guilty verdicts on all counts for four of the five defendants. It had not been instructed on the enactment date of the bank fraud statute. Petitioner retained new counsel for sentencing and appeal. His new counsel discovered that the bank fraud statute had not been enacted until October 12, 1984, and sought a new trial, arguing that Petitioner's convictions violated the Ex Post Facto Clause. The district court denied the motion, holding that Petitioner had waived the issue and that there was no error because post-enactment evidence was presented. Pet. App. 101a-104a. The court sentenced Petitioner to 46 months' imprisonment on conspiracy and bank fraud and a concurrent 60 months on misapplication. Pet. App. 10a.

4. The First Circuit affirmed. It noted that the government had conceded most of the "plain error" analysis, and acknowledged that the courts of appeals were divided on the Ex Post Facto Clause issue. Pet. App. 58a-61a. Under the approach taken by the Second, Third and Seventh Circuits, a conviction cannot stand if it is reasonably possible that the jury relied exclusively on pre-enactment

conduct. Pet. App. 60a-61a. By contrast, under the approach followed by the Ninth Circuit and one Fifth Circuit panel, a conviction may stand as long as it is supported by substantial post-enactment evidence. Pet. App. 58a-59a. The court ostensibly took no position on this split, opining that Petitioner could not prevail even under the standard most favorable to defendants (that of the Second, Third and Seventh Circuits). Pet. App. 61a. The court then held, echoing the Ninth Circuit, that the error did not affect Petitioner's "substantial rights" because there was "considerable evidence" of post-enactment events and because the "majority" of the overt acts in the indictment were post-enactment. Pet. App. 62a. The court also found no "transformative event" distinguishing pre-enactment from post-enactment conduct—analysis not followed by any other circuit—and held on that basis that the jury could not have relied solely on pre-enactment acts. Pet. App. 62a-63a.

The defendants sought rehearing, but the First Circuit denied the petitions on July 20, 2007. *See* Pet. App. 118a. Petitioner sought a stay of the mandate pending a certiorari petition, which was granted.

REASONS FOR GRANTING THE PETITION

This Court should grant review to resolve a broad and entrenched conflict among the courts of appeals. As the First Circuit acknowledged (*see* Pet. App. 58a-61a), there is substantial disagreement among the courts of appeals on the standard for reviewing a district court's failure to instruct a jury on the enactment date of a criminal statute, as required by the Ex Post Facto Clause. The Second, Third, Seventh and D.C. Circuits, and the *Brown*

panel of the Fifth Circuit, require reversal if it is reasonably possible that the jury relied solely on pre-enactment evidence and thereby violated the defendant's Ex Post Facto Clause rights. By contrast, the Fourth, Sixth, Ninth and Eleventh Circuits, and the *Todd* panel in the Fifth Circuit, would uphold a conviction if there is substantial post-enactment evidence, even if the jury was not instructed on the enactment date. Had this case arisen in the Second, Third, Seventh, or D.C. Circuits, the court would have vacated Petitioner's convictions because the record establishes a reasonable possibility that the jury relied exclusively on pre-enactment evidence. Tracking the Ninth Circuit's approach, however, the court of appeals here affirmed the convictions. That decision conflicts with this Court's precedents disfavoring judicial factfinding to uphold a conviction and mandating that ambiguities in jury verdicts be resolved against the government. The confusion and uncertainty arising from this split, together with the importance of this constitutional question, warrant a grant of certiorari.

A. THE CIRCUITS HAVE SPLIT ON AN IMPORTANT CONSTITUTIONAL ISSUE.

The Ex Post Facto Clause of the Constitution prohibits Congress from criminalizing conduct after it has occurred, *Collins v. Youngblood*, 497 U.S. 37, 42 (1990), or from increasing the punishment for a crime after it is committed. *Miller v. Florida*, 482 U.S. 423, 429 (1987). The lower courts agree that the Ex Post Facto Clause is not necessarily violated by the prosecution of an offense that begins before but continues after the enactment date of the statute. *See, e.g., United States v. Duncan*, 42 F.3d

97, 104 (2d Cir. 1994). In such cases, however, the jury must rely on post-enactment evidence to find all elements of the crime; exclusive reliance on pre-enactment evidence to find any element violates the Ex Post Facto Clause.

Ordinarily, juries are instructed on the relevant enactment date, and decide whether the offense is fully proven post-enactment. When, as in this case, the jury is *not* so instructed, courts must determine whether the error could have resulted in a verdict that violates the Ex Post Facto Clause. A widespread conflict has emerged among the courts of appeals regarding the proper standard for determining whether a jury verdict runs afoul of the Ex Post Facto Clause's protections.

1. Many Circuits Vacate Continuing-Offense Convictions If It Is Reasonably Possible That An Ex Post Facto Clause Violation Occurred.

Four circuits have adopted a standard for reviewing Ex Post Facto Clause instructional errors that asks whether it was reasonably possible that the jury relied exclusively on that evidence and thereby violated the Ex Post Facto Clause.

The Second Circuit's decision in *United States v. Torres*, 901 F.2d 205, 224 (2d Cir. 1990), dealt with this question in the context of the "continuing criminal enterprise" sentencing enhancement enacted on October 27, 1986. That provision requires life imprisonment for a "principal administrator, organizer, or leader" of a criminal enterprise that obtains gross receipts exceeding $10 million in a twelve-month period. 18 U.S.C. § 848(b)(1). In *Torres*, as here, the district court did

not instruct the jury on the enactment date. Rather, it told the jury that it could convict the defendants if they acted as administrators between June 24, 1986, and June 23, 1987, and if the enterprise grossed $10 million in that period.[14] In reviewing for plain error, the Second Circuit acknowledged that it was "quite unlikely that the jury would have found a significant difference in the character of these appellants' relationship to, and leadership of, the [enterprise] before and after October 27, 1986." 901 F.2d at 228. Indeed, the only evidence of the enterprise's violations was *post*-enactment; all of the acts presented at trial occurred in 1987. *Id.* at 228-29. Nevertheless, the court held, as long as it was possible that the jury relied on pre-enactment evidence for the "administrator" finding, reversal was required no matter how unlikely such a finding was, or how likely it was that the jury, suitably instructed, would have found that the defendants acted as "administrators" after October 27, 1986. *Id.* at 229. Accordingly, the court vacated the conviction. *Id.*; *cf. United States v. Harris*, 79 F.3d 223 (2d Cir. 1996) (where statute required that jury find "series" of violations and only one of nineteen acts predated the relevant enactment date, "no possibility" of exclusive reliance on pre-enactment conduct); *United States v. Monaco*, 194 F.3d 381, 386 (2d Cir. 1999) ("A conviction for a continuing offense straddling enactment of a statute will not run afoul of the Ex Post Facto clause unless it was possible for

---

[14] The First Circuit stated that *Torres* was distinguishable because the defendants there preserved their objection. In fact, the *Torres* court noted that the defendants' objection below "[did] not suffice to preserve an objection for appeal, absent plain error." Pet. App. 60a n.34.

the jury, following the court's instructions, to convict 'exclusively' on pre-enactment conduct"; no violation because jury was properly instructed).

The Third Circuit has followed the Second Circuit's approach. In *United States v. Tykarsky*, 446 F.3d 458 (3d Cir. 2006), the defendant was convicted under a solicitation statute, the minimum sentence for which was increased on April 30, 2003; of the nine acts presented at trial, seven occurred after that date. The court held that, if "a reasonable jury could have concluded only that the attempted persuasion or enticement continued past April 30," then the conviction could stand. *Id.* at 480-81. Because it was possible that the jury did not find the post-April 30 conversations to constitute "enticement or persuasion," there was "at least a possibility that the jury convicted Tykarsky based solely on pre-[enactment] conduct. . . . The most that can be said here is that it is improbable, rather than impossible, as a *factual matter*, that the jury convicted Tykarsky exclusively on the basis of pre-April 30 acts." *Id.* at 482 (emphasis in original). Hence, even though the majority of the conduct was post-enactment, the court found plain error and vacated Tykarsky's sentence. The court also rejected the government's argument that that "judicial fact-finding" was permissible, holding that the jury, not the judge, was responsible for finding a violation after the enactment date. *Id.* at 480 n.18.

The Seventh Circuit has applied the same analysis. In *United States v. Julian*, 427 F.3d 471 (7th Cir. 2005), *cert. denied*, 546 U.S. 1220 (2006), the court held that the failure to instruct the jury as to a statutory enactment date "implicated Julian's ex post facto rights." 427 F.3d at 482. Julian was

convicted of conspiracy under a provision whose maximum penalty was increased on October 30, 1998. The jury was never instructed to consider whether the conspiracy extended past that date, and the court found that "[i]f a jury, properly instructed on this point, might have found that the conspiracy had come to an end before the increased penalty took effect or that Julian had withdrawn from the conspiracy before that date," vacatur was required. *Id.* at 482. If "a reasonable jury could only have concluded that the conspiracy continued beyond the effective date of the new statute and that Julian remained a member of the conspiracy beyond that date," however, no violation occurred. *Id.* at 482-83. There was no dispute that the conspiracy had continued past October 30, and nothing in the record indicated an affirmative act by Julian to withdraw from the conspiracy prior to that date. *Id.* at 483. Hence, "no reasonable jury" could have found withdrawal, and there was no plain error.[15]

---

[15] The First Circuit attempted to distinguish the Second and Third Circuits' decisions from the Seventh Circuit's holding, *see* Pet. App. 61a-62a, but in substance those circuits all conducted the same analysis The Seventh Circuit looked to the fourth *Olano* factor, asking whether permitting the error to stand would "implicate[] the fairness, integrity, or public reputation of the judicial process," whereas the other circuits focused on the third factor (harm to the defendant's "substantial rights"). *Julian*, 427 F.3d at 482. But all three courts asked the same question: whether the jury could have relied solely on pre-enactment acts in convicting. *Compare Julian*, 427 F.3d at 482 ("If a jury, properly instructed on this point, might have found that the conspiracy [came] to an end before the increased penalty took effect . . . then the error is one that implicates the fairness, integrity, or public reputation of the judicial process.") *with Tykarsky*, 446 F.3d at 480 ("To affec[t] substantial rights, the error must have been prejudicial. Tykarsky has been

The D.C. Circuit, in *United States v. Mitchell*, 49 F.3d 769 (1995), has also looked to the sufficiency of pre-enactment evidence. At issue in *Mitchell* was the same sentencing enhancement considered in *Torres*; because all of the violations submitted to the jury were committed after the relevant enactment date, the court had "no doubt" that the jury had found him to have led the criminal enterprise based on post-enactment acts, and hence found no plain error. *Id.* at 781; *see also United States v. Williams-Davis*, 90 F.3d 490, 511 (D.C. Cir. 1996) (discussing, in preserved-error context, whether exclusive reliance on pre-enactment evidence was "possible"; no violation because conviction on pre-enactment evidence required "bizarrely configured jury finding" the likelihood of which was "zero").

One Fifth Circuit decision has adopted the same legal standard for reviewing Ex Post Facto Clause appeals. In *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), the court addressed a conspiracy that lasted from 1966 to 1974 and a statute enacted in October 1970. Even though the majority of the acts in furtherance of the conspiracy had been committed after the enactment date, *see id.* at 412 n.4, the court found plain error and vacated the convictions. The court held that assuming that the jury did not rely on pre-enactment conduct would amount to impermissibly directing a verdict for the prosecution. *Id.* at 421.

Finally, two state supreme courts have also adopted this approach. In *Knowles v. State*, 708 So.

---

prejudiced if there is a reasonable possibility that a jury, properly instructed on this point, might have found Tykarsky guilty based exclusively on acts that occurred before the increased penalty took effect.") (citation omitted).

2d 549 (Miss. 1998), the statute was amended on July 1, 1995 to delete a required element of the crime. The defendant was convicted of an offense that ran from May 1993 to December 1995. On appeal, he argued that the failure to instruct on the enactment date violated the Ex Post Facto Clause (an objection apparently preserved below), and the Mississippi Supreme Court vacated the conviction. The court concurred with other state courts' holdings that a failure to instruct the jury on the enactment date of a continuing offense violates the Clause, even if "some of the unlawful conduct occurred after the new law became effective." *Id.* at 554-56. In *State v. Aho*, 975 P.2d 512 (Wash. 1999), the relevant statute was enacted on July 1, 1988, and the defendant was convicted for conduct running from January 1987 to December 1982 for one offense and to August 1995 for another. The Washington Supreme Court vacated the conviction (despite the defendant's failure to preserve the issue), holding that the failure to instruct the jury on the significance of the July 1, 1988 enactment date made it "possible that Aho has been illegally convicted based upon an act or acts occurring before the effective date." *Id.* at 516.[16]

---

[16] *See also People v. Kyle*, 111 P.3d 491, 506 (Colo. App. 1994) (sentencing enhancement improperly applied when jury could have relied on pre-enactment conduct); *People v. Luman*, 994 P.2d 432, 437 (Colo. App. 1999) (same); *People v. Graham*, 876 P.2d 68, 72 (Colo. App. 1994) (same); *State v. Ricci*, 593 A.2d 362, 364-65 (N.J. Super. Ct. App. Div. 1991) (jury should have been instructed that July 1, 1987 was effective date of "kingpin" statute enhancing penalties, since defendant was charged with crime lasting from August 1986 through August 1987; "we can not be sure" that jury would have found that defendant led conspiracy after July 1, and error was plain); *State v. Hudspeth*, 821 P.2d 547, 547 (Wash. App. 1992) ("[B]ecause the jury was

Accordingly, in the Second, Third, Seventh and D.C. Circuits, and in Mississippi and Washington, courts have set a clear standard: a conviction must be vacated if the elements of the offense were established by pre-enactment evidence, such that the jury *could* have returned a conviction based solely on that evidence. In those jurisdictions, courts do not require further proof that such reliance was the more likely outcome, or that post-enactment acts were qualitatively different from pre-enactment conduct. Only when it is not reasonably possible for a jury to have rendered its decision based exclusively on pre-enactment evidence will those courts uphold a verdict. Accordingly, had Petitioner's case arisen in any of these jurisdictions, his conviction would have been vacated on appeal.

2. Four Circuits Have Drawn Inferences In The Government's Favor.

The Fourth, Sixth, Ninth and Eleventh Circuits have taken the opposite tack. Those courts look to the nature and volume of *post*-enactment events and uphold convictions whenever that evidence was sufficient to support a jury verdict, regardless of whether the verdict could reasonably have rested exclusively on pre-enactment evidence.

In *United States v. Calabrese*, 825 F.2d 1342 (1987), the Ninth Circuit upheld a conviction based on evidence post-dating the relevant enactment date. The defendant had been convicted of conspiracies that began in October 1982 and November 1983;

---

not instructed to indicate when the offenses occurred, we cannot reject the possibility that Hudspeth was convicted of violating a statute that was not in effect at the time the offenses occurred"; vacating though objection not preserved).

both ended in November 1984. *Id.* at 1346. The relevant statute was enacted on October 12, 1984, and the Ninth Circuit held that there was "substantial evidence" to support a jury finding that the conspiracy extended beyond that date, without discussing whether it was possible that the jury did not so find. *Id.* (One defendant had raised the issue at sentencing, but not at trial. *Id.*)

The Sixth Circuit adopted a similar test in *United States v. Henson*, 848 F.2d 1374 (1988), where it concluded that, although all of the overt acts set forth in the indictment occurred before a fine enhancement provision went into effect on January 1, 1985, the provision was nonetheless applicable because "there was evidence of other acts that were performed in furtherance of the conspiracy after December 31, 1984." *Id.* at 1386. Like the Ninth Circuit, the Sixth Circuit in *Henson* offered no reason to believe that the jury must have relied—or, even, was more likely to have relied—on the evidence of post-enactment conduct. The existence of that evidence in the record was sufficient.[17]

The Eleventh Circuit has embraced the same test. In *United States v. Cortez*, 757 F.2d 1204 (11th Cir. 1985), the court considered a conspiracy that

---

[17] Both the Sixth Circuit in *Henson* and the Ninth Circuit in *Calabrese* also suggested that the problem can be assumed away, reasoning that a guilty verdict on a continuing offense necessarily means a conclusion that the offense lasted for the full duration stated in the indictment. 848 F.2d at 1385; 825 F.2d at 1346. No other circuits appear to have endorsed that view, and it is inconsistent with this Court's holdings that the government need not prove all of the overt acts alleged in an indictment to obtain a conspiracy conviction. *See, e.g., Dennis v. United States*, 384 U.S. 855, 863 n.8 (1966).

began in the fall of 1979 and extended through November 1980 and a statute that was enacted on September 15, 1980. That court held that "[e]nough activities of the conspirators continued after § 955a's enactment so that even if the jury had been instructed by the trial court as to the date of enactment and to consider only activities thereafter, there is no doubt that the jury would have decided the case the same way." *Id.* at 1207.

The Fourth Circuit followed this approach in *United States v. Scates*, No. 86-5621, 818 F.2d 30 (table), 1987 WL 37328 (May 6, 1987), holding that, where one out of three acts occurred after the effective date of a sentencing enhancement, there was no Ex Post Facto Clause violation even though the jury was not instructed on that enactment date. The court noted Scates's argument (not preserved below) that "the jury may have convicted him solely on the basis of events occurring prior to the effective date of the act," 1987 WL 37328 at *3, but affirmed his conviction without addressing that possibility.

Finally, one panel of the Fifth Circuit adopted this standard in *United States v. Todd*, 735 F.2d 146 (1984). The defendants there were convicted of a conspiracy that began before the effective date of a sentencing enhancement. *Id.* at 149. The jury was not instructed on the significance of the date, but the court found no plain error as to the Ex Post Facto Clause violation because "[m]ost of the evidence focused on events" occurring after that statutory date. *Id.* at 150. Notably, the same was true of the evidentiary record for the Fifth Circuit's earlier decision in *Brown*, *supra*. Yet the panel in *Brown* found plain error. The Fifth Circuit thus has a

longstanding and unresolved internal conflict on this question.

Unlike the Second, Third, Seventh and D.C. Circuits, therefore, the Fourth, Sixth, Ninth and Eleventh Circuits do not consider whether the jury verdict could reasonably have rested on pre-enactment evidence. In the latter courts, the existence and volume of *post*-enactment evidence is controlling.

This conflict is entrenched. The First and D.C. Circuits have denied requests for rehearing en banc, and the split has persisted for more than twenty years. All of the circuits with criminal dockets other than the Eighth and Tenth Circuits have now addressed the issue. This Court's review is therefore needed to resolve the dispute.

B. UNDER THE SECOND, THIRD, SEVENTH AND D.C. CIRCUITS' STANDARD, PETITIONER'S CONVICTIONS MUST BE VACATED.

The First Circuit acknowledged the split of authority among the circuits, but concluded that Petitioner would fail under either standard. In so holding, the court misapprehended the test followed by the Second, Third, Seventh and D.C. Circuits and its effect in this case. In those circuits, if there is a reasonable possibility that the jury relied solely on the pre-enactment acts alone, the conviction must be vacated. That standard was met here.[18]

---

[18] Trial counsel in this case did not request an instruction on the enactment date, and the First Circuit accordingly reviewed for plain error. Virtually every significant decision on this issue has been in that context, as set forth above (unsurprisingly, as it would be unusual for a district court to

1. The First Circuit Did Not Follow The Second, Third, Seventh and D.C. Circuit's Analysis.

The First Circuit's analysis relied on the relative quantities of pre- and post-enactment evidence, mirroring the analysis of the Fourth, Sixth, Ninth, and Eleventh Circuits. The differences between the First Circuit's approach and that of the Second, Third, Seventh, and D.C. Circuits are clear and sharp.

In *Torres* and *Tykarsky*, the Second and Third Circuits unequivocally held that a failure to instruct

---

refuse to instruct the jury on a statutory enactment date). The government conceded three of the four elements of plain error on appeal: error occurred, it was "clear or obvious," and letting it go uncorrected would "seriously impair the fairness, integrity, or public reputation of judicial proceedings." *See United States v. Olano*, 507 U.S. 725, 732-36 (1993). The only question in dispute here was whether the error influenced the verdict and thereby affected Petitioner's "substantial rights." *See id.* at 734. The other plain error decisions on this issue have likewise turned on whether the failure to instruct affected the verdict. Accordingly, this Court need only resolve the dispute over when an uninstructed jury's verdict violates "substantial rights" to harmonize the law in this area.

Even in the rare case where an instruction on the enactment date is requested but not given, and the review is thus for harmless error rather than plain error, the required analysis is substantively the same. The "substantial rights" inquiry under *Olano* is identical to the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52 for preserved errors. *Compare Mitchell*, 49 F.3d at 781 (in plain-error inquiry, discussing whether jury "could have" convicted based solely on pre-enactment acts) *with Williams-Davis*, 90 F.3d at 511 (in preserved-error setting, discussing whether exclusive reliance on pre-enactment conduct was "possible" and following *Mitchell*'s analysis). The only difference is that, under plain error, the defendant bears the burden of persuasion. *Olano*, 507 U.S. at 734.

the jury on the Ex Post Facto Clause cannot be held harmless under plain-error analysis merely on the ground that most of the evidence post-dated the statutory enactment date. Yet that was precisely the reasoning offered by the First Circuit. *See* Pet. App. 62a. In *Torres*, for instance, the question for sentencing purposes was whether the defendant acted as a leader or organizer of a criminal enterprise after the relevant date. *All* of the enterprise's acts in question occurred post-enactment, and the Second Circuit found it "quite unlikely" that the defendant assumed such a role and then abandoned it *before* the enterprise committed any criminal acts. 901 F.2d at 228. Nevertheless, because it was "possible" that the jury's verdict rested on such a finding, the sentence was vacated on appeal. *Id.*

Similarly, in *Tykarsky*, seven of the nine acts presented at trial post-dated the statute, yet the Third Circuit found a "reasonable possibility" that the jury relied exclusively on one of the two pre-enactment acts and vacated the conviction. 446 F.3d at 482. Like the Second Circuit, the Third Circuit found the Ex Post Facto Clause error to be plain even though most of the evidence supported a conviction on proper grounds: "The most that can be said here is that it is improbable, rather than impossible, as a *factual matter*, that the jury convicted Tykarsky exclusively on the basis of pre-April 30 acts." *Id.* (emphasis in original). *See also Julian*, 427 F.3d at 482 (Seventh Circuit holding that, "[i]f a jury, properly instructed on this point, *might have found* that the conspiracy had come to an end before the increased penalty took effect or that Julian had withdrawn from the conspiracy before that date," the

conviction must be vacated) (emphasis added); *Williams-Davis*, 90 F.3d at 511 (D.C. Circuit, addressing whether it is "possible" that verdict rested on pre-enactment conduct); *Brown*, 555 F.2d at 412 n.4, 421 (Fifth Circuit, vacating conviction even though majority of overt acts occurred after the enactment date).

The First Circuit's analysis cannot be reconciled with the holdings of those Circuits. The court was only able to uphold the conviction by holding that the "majority" of the evidence presented at trial and the "bulk" of the allegations considered in its sufficiency analysis were post-enactment, and that there was "considerable" evidence of post-enactment conduct. Pet. App. 62a. The court further noted that "relatively few" (22 out of 104) of the acts set forth in the indictment occurred before October 12, 1984. *Id.* On that basis, the court concluded that the jury did not rely exclusively on pre-enactment evidence. *Id.*

The contrast between this case and *Tykarsky*, in which the Third Circuit vacated a sentence even though seven of the nine acts were post-enactment, is stark. Although the ratio of pre-enactment to post-enactment acts was virtually identical in these two cases, the courts reached opposite results. *See* 446 F.3d at 482. The Second Circuit's holding in *Torres* is even more inconsistent with the First Circuit's approach, since *all* of the evidence in *Torres* post-dated the enactment. 901 F.2d at 229. Accordingly, that the majority of the evidence in this case related to post-enactment conduct was not by itself sufficient, under those circuits' standard, to support a finding that the jury's exclusive reliance on pre-enactment conduct was "impossible." *See, e.g.*, 446 F.3d at 482.

The First Circuit also noted that it saw "nothing to differentiate appellants' pre-enactment conduct from subsequent conduct," because certain key government witnesses testified about both pre- and post-1984 transactions and there was no "transformative event" prior to October 12, 1984.[19] Pet. App. 62a. Again, whatever the merits of this view, it cannot be reconciled with the approach adopted by the Second, Third, Seventh, and D.C. Circuits, who do not require a "transformative event" in their plain-error analysis.[20] Indeed, in *Torres*, the Second Circuit specifically noted the absence of such an event, finding it "quite unlikely that the jury would have found" a meaningful distinction between pre- and post-enactment conduct. 901 F.2d at 229.[21]

---

[19] That many government witnesses testified about both pre- and post-enactment conduct did not make it "implausible that the jury would find such testimony compelling only for" pre-enactment acts. Pet. App. 62a. The jury need not have believed any witness's testimony for one period and not for another because those witnesses were testifying about different transactions in the different time frames.

[20] The Seventh Circuit did focus on withdrawal from the conspiracy in *Julian*, finding no withdrawal and affirming on that ground. 427 F.3d at 483. The duration of the continuing offense in that case was not at issue, however. The only dispute was whether the jury could have found that the defendant withdrew from the conspiracy. *Id.* To show withdrawal, a defendant must prove an "affirmative act to defeat or disavow the criminal aim of the conspiracy." In light of that "high evidentiary threshold," the court concluded that "no reasonable jury" would have convicted the defendant based on his pre-enactment conduct. *Id.* Outside the factual context of that case, therefore, the *Julian* decision does not dictate a "transformative event" analysis.

[21] Even if the First Circuit's "transformative event" analysis were appropriate, reversal would still be required because there were, in fact, "transformative events" near or prior to the

Hence, the First Circuit's analysis conflicts with the standard adopted by the Second, Third, Seventh and D.C. Circuits. The First Circuit did not demonstrate that a jury verdict based solely on pre-enactment evidence was "impossible," or even that such a verdict was particularly "improbable." Rather, the court reasoned that such an outcome was less likely than a verdict based on post-enactment evidence—a holding that mirrored the Fourth, Sixth, Ninth and Eleventh Circuits' approach. *See, e.g.*, Pet. App. 62a ("considerable" post-enactment evidence); *compare Calabrese*, 825 F.2d at 1346 ("substantial evidence"); *Cortez*, 757 F.2d at 1207 ("[e]nough activities of the conspirators"); *Todd*, 735 F.2d at 150 ("most of the evidence"). Like those courts, the First Circuit focused on the volume and sufficiency of the post-enactment evidence and did not address whether pre-enactment evidence, standing alone, could have supported the convictions. It also assumed, unsupported by precedent, that the jury could not have distinguished pre-enactment from post-enactment conduct because there was no pre-enactment "transformative event." The First Circuit's decision therefore deepened and underscored the split among the Circuits.

---

enactment date that could easily have "differentiated" pre-enactment from post-enactment conduct in the jury's view, notably the end of Gutierrez's direct construction-loan borrowing relationship with the bank.

2. There Is A Reasonable Possibility That The Jury Relied Exclusively On Pre-Enactment Evidence in Convicting Petitioner.

Had the First Circuit followed the Second, Third, Seventh and D.C. Circuits' analysis, it would have vacated Petitioner's convictions. There was more than enough pre-enactment evidence in the record to pose a reasonable possibility that the jury relied exclusively on such evidence.

The prosecution spent significant amounts of time at trial presenting evidence of acts prior to October 12, 1984. In particular, three of the seven construction loans that were the subject of the Gutierrez bank fraud count—Transglobe La Marina, Levittown and Country Club—were executed between 1980 and 1982 and were paid off in October 1984. There was extensive discussion of each of those loans at trial. Government witnesses testified at length about lack of progress on the construction projects, payments of interest from loan proceeds, and transfers of funds from other projects into and out of the loans.[22] The prosecution made it even more likely that the jury would rely on this evidence by emphasizing it repeatedly in its brief closing.[23]

---

[22] *See, e.g.*, JA-T-0083-97, -3173D-3173I (excerpts from La Marina testimony); JA-T-0143-59, JA-T-2886-2903 (Levittown); JA-T-0174-0244, -1196 (Country Club).

[23] *See, e.g.*, JA-T-3593 (defendants "failed to build the required number of houses" on La Marina, Levittown and Country Club projects), -3594 ("No houses were ever built or installed" on La Marina and "the Levittown project, Transglobe phase, in which very little houses were built, millions were disbursed by Caguas"), -3595 (La Marina, Country Club and Levittown houses "not built, even though millions of dollars were disbursed"), -3675.

On the Mirandes bank fraud count, while there was less pre-enactment activity, the jury could have relied on that activity to return a guilty verdict. In particular, there was extensive testimony about pre-enactment conduct relating to the Reparto Valenciano loan, executed in December 1981.[24] There was similar testimony about the Villas de Gurabo loan, executed early in 1984.[25]

Significant amounts of trial time were devoted to other allegations of pre-enactment conduct. In particular, the prosecution called ten witnesses, spending more than two weeks of trial, to suggest that the defendants had forged third-party endorsements of two-party checks. Virtually all of that evidence predated October 12, 1984.[26] Another prosecution witness claimed that the defendants were responsible for "check kiting" in 1983.[27] Again, the prosecutor amplified the likelihood of the jury relying on these pre-enactment acts by emphasizing them at closing.[28]

Moreover, the prosecution itself directed the jury's attention to conduct that predated the fraud statute's enactment. The prosecutor told the jury

---

[24] *See, e.g.*, JA-T-0507-19 (pre-1984 disbursements and transfers), -2290-96 (1981 discussions between Mirandes and bank officers about the handling of the loan), -1328-29 (increases to and disbursements from the loan prior to enactment).

[25] *See, e.g.*, JA-T-0529-33.

[26] *See, e.g.*, JA-T-1550-59 (1982), -1583-86 (1982), -2013-18 (1982-83), -2382-83 (1981), -2343-44 (1982), -2067-71 (1982).

[27] *See, e.g.*, JA-T-1768-86.

[28] *See, e.g.*, JA-T-3634-35 ("In the years of 1982 and 1983 . . . there has been evidence with regard to forged endorsements on checks missing from La Marina and Levittown Plaza projects. Transglobe phases."), -3678-80, -3575-76, -3687.

during rebuttal that "it is sufficient [for a guilty verdict] that the evidence in the case establish[es] beyond a reasonable doubt that the offense was committed on a date reasonably near" the inception of the alleged conspiracy.[29] In that light, and in light of the pre-enactment evidence presented throughout the trial and emphasized by the prosecution at closing, it is likely that the jury relied on that evidence; the only question is whether it *also* relied on post-enactment evidence in returning bank fraud convictions. Nothing in the record indicates that it did, and there is a reasonable possibility that it did not.

Hence, fairly viewed, the record contains more than enough pre-enactment conduct for the jury to have rested solely on such conduct in returning its verdicts. The Second, Third, Seventh, and D.C. Circuits would to be plain, and would have vacated Petitioner's convictions.

C. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

The court in this case, like the Fourth, Sixth, Ninth and Eleventh Circuits, deemed constitutional error harmless (under the plain-error standard) by relying on the volume of properly admitted evidence and resolving doubts in favor of the government. This Court has repeatedly criticized that approach, holding that the volume of legitimate evidence in the record is irrelevant and that ambiguities arising from constitutional error should be resolved against the prosecution. The court's willingness to substitute itself for the finder of fact also runs afoul

---

[29] JA-T-3667-68.

of this Court's precedents cautioning against judicial factfinding.

1. This Court Has Articulated a Demanding Standard of Review for Constitutional Errors.

Under both the plain and harmless error standards, a conviction must be vacated if there is a "reasonable possibility" that constitutional error affected the verdict.[30] *Chapman v. California*, 386 U.S. 18, 23 (1967). The Court has often applied the *Chapman* analysis, or a variation thereof, in analyzing error in the context of improper, or improperly withheld, instructions. *See, e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990); *Boyde v. California*, 494 U.S. 370, 380 (1990); *Mills v. Maryland*, 486 U.S. 367, 376 (1988); *Rose v. Clark*, 478 U.S. 570, 584 (1986); *Francis v. Franklin*, 471 U.S. 307, 320 (1985).

When constitutional error occurs, the volume of properly admitted evidence is ordinarily immaterial. The Court "has held it irrelevant in analyzing a mandatory presumption . . . that there is ample evidence in the record other than the presumption to support a conviction." *County Court v. Allen*, 442 U.S. 140, 160 (1979). Courts may not deem errors

---

[30] As noted above, virtually every case addressing this issue has done so in the plain-error context and has found that the analysis turns on whether the error affected the verdict, an inquiry that the Court in *Olano* characterized as the "affecting substantial rights" prong of plain-error review. 507 U.S. at 735. Because the "affecting substantial rights" analysis is substantively the same as the harmless-error test developed by this Court, *see Olano*, 507 U.S. at 734, the Court's harmless error precedents are fully relevant.

harmless simply on grounds that there was sufficient legitimate evidence to support the verdict:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. . . . The most an appellate court can conclude [in this case] is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt - not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough.

Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993); *see also Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."). The mere existence of properly admitted evidence in the record, therefore, even in substantial quantities, is not sufficient to excuse constitutional error.

Where one of several possible grounds for a conviction is legally defective, this Court has held that the conviction cannot stand. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 526 (1979) ("[W]hen a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside."); *Street v. New York*, 394 U.S. 576, 586-87 (1969) ("[A]ppellant's conviction must be set aside if we find that it could have been based solely upon his

words and that a conviction resting on such a basis would be unconstitutional."); *Yates v. United States*, 354 U.S. 298, 312 (1957) (vacating conspiracy conviction because "it is impossible to tell which ground the jury selected"); *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945); *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *Stromberg v. California*, 283 U.S. 359, 368 (1931)

Finally, the Court has repeatedly disapproved judicial displacement of the jury's factfinding role. In recent years, it has repeatedly done so in the sentencing context. *See Cunningham v. California*, 127 S.Ct. 856, 871 (2007); *Shepard v. United States*, 544 U.S. 13, 25-26 (2005); *United States v. Booker*, 543 U.S. 220, 246-47 (2005); *Blakely v. Washington*, 542 U.S. 296, 309 (2004). At other times, the Court has expressed concern about appellate courts' finding of substantive facts in order to uphold a jury verdict. *See, e.g.*, *Sullivan*, 508 U.S. at 280 ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action,"); *United States v. Bagley*, 473 U.S. 667, 707 n.7 (1985) (harmless error analysis may not "substitute the reviewing court's judgment of the facts . . . for that of the jury"); *Marks v. United States*, 430 U.S. 188, 196 n.12 (1977) (appeals court's factual judgment as to element of offense "not an adequate substitute for the decision in the first instance of a properly instructed jury").

This Court, in short, has repeatedly emphasized that harmless constitutional errors are the exception, not the rule. Under *Chapman*, constitutional error is not harmless if there is a "reasonable possibility" that it affected the verdict; under *Allen* and *Sullivan*, courts cannot simply point

to substantial legitimate evidence in the record and assert on that ground that constitutional errors are harmless; and under *Yates* and *Sandstrom*, when one among many justifications for a jury verdict is defective, that is sufficient to overturn a conviction. Generally, doubts are to be resolved in the defendant's favor and judicial factfinding on appeal disfavored; this Court has been reluctant to assume that the jury ignored the presumption and relied only on lawful grounds, or that a significant volume of *proper* evidence justifies an assumption that the jury did not rely on the *improper* evidence.

2. The First Circuit's Ex Post Facto Clause Analysis Is Inconsistent With This Court's Approach to Error Review.

The analysis embraced by the First Circuit here, and by the Fourth, Sixth, Ninth and Eleventh Circuits, conflicts with these precedents. Specifically, contrary to *Sullivan*, the focus in those decisions on whether the *post*-enactment evidence was sufficient to support the jury's verdict inverts the "affecting substantial rights" inquiry under *Olano*. Rather than vacating convictions due to the possibility that a violation occurred, those decisions affirm if it was possible that the violation *did not* occur. *See, e.g.*, Pet. App. 62a ("considerable" post-enactment evidence); *Calabrese*, 825 F.2d at 1346 ("substantial"); *Cortez*, 757 F.2d at 1207 ("enough"). That might be appropriate in a sufficiency-of-the-evidence analysis, but it is inappropriate for considering constitutional error, even in the plain-error setting. Nor, under this Court's precedents, is it proper in this setting for lower courts to weigh the relative volume of pre-enactment and post-enactment evidence and conclude that the jury must

have relied on the larger pile of documents. *See* Pet. App. 62a ("relatively few" of the overt acts in the indictment preceded October 12, 1984); *id.* ("[T]he bulk of our sufficiency analysis details conduct occurring after the enactment date."); *Todd*, 735 F.2d at 150 ("[m]ost of the evidence" post-enactment); *compare Allen*, 442 U.S. at 160 (that there is "ample evidence in the record other than the presumption to support a conviction" is irrelevant).

To determine whether a constitutional violation is harmless (or "affects substantial rights" under *Olano*), courts must examine the record to assess the likely impact of the violation. *See, e.g., Olden v. Kentucky*, 488 U.S. 227, 232-33 (1988). Here, determining whether the jury could have relied on pre-enactment evidence required an analysis of what that evidence was, how it related to other evidence in the record and functioned within the prosecution's case, and how it was treated at trial. The First Circuit failed to undertake that analysis. It asserted in cursory fashion that Gutierrez and Umpierre "remained employed by the company" after the enactment date and that "their culpable conduct . . . continued uninterrupted after the sale of the company." Pet. App. 63a. In other words, rather than explain why there was no "reasonable possibility" of exclusive reliance on pre-enactment acts, the court simply restated the undisputed fact that the conduct continued past the enactment date. *Id.* Such "analysis" is insufficient to meet the *Chapman* standard. It is significant as well that the First Circuit never concluded beyond a reasonable doubt that the jury did not rely exclusively on pre-enactment evidence, as *Chapman* requires. 386 U.S. at 24.

Nor did the First Circuit's assertion that "the government presented overwhelming evidence of appellants' conduct, the majority of which occurred after October 12, 1984," support a finding that the error did not affect Petitioner's substantial rights. Pet. App. 62a. Even on its face, the decision did not establish that there was "overwhelming" post-enactment evidence. The court opined that all of the conduct taken together was overwhelming, but it found only that the *majority* of the evidence post-dated the enactment date. Furthermore, the court misapplied this Court's "affecting substantial rights" analysis, repeatedly suggesting that the jury would have convicted the defendants even without the pre-enactment evidence. That is not the relevant inquiry. The Court held in *Sullivan* that the question is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." 508 U.S. at 279.

The First Circuit's approach to this issue, especially its focus on the sufficiency of post-enactment evidence, conflicts with many of this Court's precedents. Those conflicts warrant this Court's review.

D. THIS CONSTITUTIONAL QUESTION IS IMPORTANT AND RECURRING, AND IS APPROPRIATELY RESOLVED IN THIS CASE.

The question of how to review general jury verdicts resting on evidence that spanned the enactment of a pertinent statute is one of paramount importance. The issue implicates the first and most fundamental aspect of Ex Post Facto Clause

prohibitions—the bar to prosecution for acts that were not criminal when committed. *Calder v. Bull*, 3 U.S. 386, 391-92 (1798). The Framers viewed that protection as essential. *Id.*; *see also Carmell v. Texas*, 529 U.S. 513, 521-25 (2000). The question thus goes to the heart of the "substantial personal rights" protected by the Clause. *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

The Court has not yet addressed the Ex Post Facto Clause's applicability to a law that is enacted in the middle of a course of conduct. The question arises often, however. The modern criminal code is replete with offenses that can continue over a course of years, including the various conspiracy and fraud statutes, and it is not uncommon for the relevant law to change over those extended periods. When juries are not informed about the change (either because the parties neglect to do so or because the changed law related to a sentencing enhancement that was not considered at the trial), the problem of ambiguous verdicts arises.

This case is an appropriate vehicle for resolving this important question. Most of the circuits have now addressed this question, so the issue is ripe for this Court's review. The First Circuit was fully aware of the split, discussed it at length, and explained the basis for its holding. Substantial amounts of pre-enactment evidence were presented at trial, so there is no question that the verdict could have violated the Ex Post Facto Clause—and if the First Circuit's approach was improper, the result must be the vacatur of Petitioner's convictions. Defendants' protections against Ex Post Facto Clause violations should not depend on where the prosecution takes place.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein*
Patricia A. Millett
Duncan N. Stevens
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave.
Washington, DC 20036
(202) 887-4000

Mark J. Rochon
MILLER & CHEVALIER CHARTERED
655 15th St. NW
Suite 900
Washington, DC 20005
(202) 626-5800

Counsel of Record